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Supreme Court of the United States

OCTOBER TERM, 1956

No. 107.

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

v.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Interest of *Amicus*.

The New York Civil Liberties Union is a non-profit membership corporation dedicated to the preservation of the Bill of Rights, and particularly the rights guaranteed by the First Amendment. It sought (and obtained) the parties' consent to the filing of this brief because it considers the Statute involved in this case a serious threat to the freedom of the press. The stipulation consenting to the filing of this brief is appended.

The Statute Involved.

The statute involved in this case is Section 22-a of the New York Code of Criminal Procedure. The statute is set out at length at pages 2-4 of the Appellant's brief.

Section 22-a vests in the mayor and the corporation counsel or the equivalent officials of every New York city, town and village, the right to sue for an injunction against the sale or distribution of any book, magazine or printed matter found "obscene, lewd, lascivious, filthy, indecent or disgusting."

At first reading the section may appear to afford some advantage to the publisher, seller or distributor of condemned literature, for it provides for a civil restraint rather than punishment by fine or imprisonment. In its operation, the section is far more repressive of expression than the criminal laws. It may be assumed that the legislature intended the statute to be more inhibitive of communication than the penal law, for it was enacted to supplement criminal prosecutions that the legislature found inadequate: *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, at p. 182. Moreover the injunctive remedy does not preclude criminal prosecution. In fact, subdivision 5 of the statute creates a presumption of guilty knowledge, to facilitate criminal prosecution.

The statute under consideration provides for institution of an action for injunction against one who sells, distributes or is "*about to* sell or distribute" the book or magazine thought to be offensive. It thus permits action against the publisher of a book before it is sold or distributed to any wholesale or retail dealer.

Although there is no specific provision to that effect in Section 22-a, it enables a local official to secure a preliminary injunction against the sale or distribution of any disapproved book or magazine before trial or hearing. Such injunction may be obtained by virtue of the provisions of New York Civil Practice Act §877 authorizing the issuance of restraining orders *pendente lite* in an action "when it appears from the complaint that the plaintiff is entitled

to a judgment against the defendant restraining the commission or continuance of an act . . .'"*

The remedy of injunction is also more effective than penal sanctions in the suppression of writing thought to be improper because it dispenses with the heavy burden in a criminal case of proof beyond a reasonable doubt that the writing in question is improper.

POINT I.

There is no warrant or justification for the invasion of the freedom of the press authorized by the statute.

Concededly Section 22-a authorizes governmental interference with the press, and such interference will not be countenanced unless the evil the statute seeks to remedy presents a clear and grave danger to society. *Dennis* v. *United States*, 341 U. S. 494, 503, 508-510, 585-586; *Marsh* v. *Alabama*, 326 U. S. 501, 508-509.

The court below assumed as the basis for its decision, that obscene books are in some way a menace to society. *Brown* v. *Kingsley Books*, 1 N. Y. 2d at p. 181. That assumption rested solely on the determination of the legislature that the law was needed. The court was aware that there has never been any proof or an objective finding that public injury follows from the publication of obscene writings. (See 1 N. Y. 2d 181, footnote 3, and *United*

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* Such an injunction was obtained in the instant case (R. 39). The New York City corporation counsel also sought a similar injunction in *Brown* v. *Meyers, et al.* (unreported), brought pursuant to section 22-a against the publisher and 59 booksellers to enjoin the sale and distribution of copies of 66 books.

States v. *Roth*, 237 Fed. 2d 796, 811-817)* Indeed, some authorities are of the opinion that obscene books do not incite to improper conduct, but on the contrary, act as safety valves, as outlets for impulses which if suppressed might lead to some injury to society. Obscenity and The Law, Norman St. John-Stevas, p. 189.

The mere enactment of a statute cannot, in the words of Mr. Justice Brandeis, "alone establish the facts which are essential to its validity." *Whitney* v. *California*, 274 U. S. 357, 374. See also *United States* v. *Carolene Products Co.*, 304 U. S. 144. The mere apprehension of a danger does not justify governmental interference with communication. To justify restraint of expression there must be something more than a fear of harm to society. It must be demonstrated that the danger is real and that it is sufficiently grave to override society's interest in, and need of, free expression.

It has been so frequently iterated that it is almost a commonplace that the democratic process is dependent on unhampered communication, and only the most serious and substantial evil—such as the danger of overthrow of the government by force—will justify any such broad interference with the freedom of the press. *Dennis* v. *United States*, 341 U. S. 494, 503, 508-510, 585-586; *Marsh* v. *Alabama*, 326 U. S. 501, 508-509; *Thomas* v. *Collins*, 323 U. S. 516, 529-530; *Bridges* v. *California*, 314 U. S. 252, 262; *Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Schneider* v. *State*, 308 U. S. 147, 161-162; *DeJonge* v. *Oregon*, 299 U. S. 353, 365; *Stromberg* v. *California*, 283 U. S. 359, 369.

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* The basic question involved in this case is also presented in *Samuel Roth* v. *United States of America*, now pending before this Court (October Term, 1956, No. 582). The Court is respectfully referred to the excellent briefs of counsel for Petitioner and *Morris L. Ernst*, *Amicus Curiae* in the *Roth* case, for a more complete discussion of the problem. A reversal of the judgment in the *Roth* case would be determinative of the main issue in this appeal.

The basic premise of the statute is that the people of New York will be misled or inspired to anti-social behavior by filthy or disgusting writings—and must therefore be shielded from error or temptation. The burden is on the State to demonstrate the validity of that premise. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503-504. Since the burden cannot be or at least has not been sustained, the statute should be struck down as an unwarranted interference with the freedom of the press.

POINT II.

The statute under consideration is so vague that its enforcement would deprive those affected by it of property without due process.

Assuming *arguendo* that there is a need for the statute to meet an evil that cannot be dealt with except by interference with the basic right of communication, the statute should be held void because of its ambiguity.

Where the right of communication may be withheld under a statute, the statute must be clear and definite. Government officials charged with enforcing a vague law, since there is no standard for its application, must determine its meaning for themselves; the statute then changes with the person of the administrator. An indefinite law is in effect no law, and one who is deprived of a right pursuant to its provisions has been denied due process of law in violation of the Fourteenth Amendment to the Constitution. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Musser* v. *Utah*, 333 U. S. 95, 97; *Winters* v. *New York*, 333 U. S. 507, 515, 518; *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 596; Due Process Requirements of Definiteness in Statutes, 62 Harvard L. R. 77 (1948).

Section 22-a authorizes prohibition of the sale and confiscation of "obscene, lewd, lascivious, filthy, indecent or disgusting" books and magazines. The terms "obscene, lewd, lascivious" etc., are merely terms of disapprobation. Their recital is a denunciation, not an objective description of the nature of the material that may be suppressed. Not one of the terms of the statute satisfies the "due process requirements of definiteness."

We are concerned here principally with the term "obscene" which Judge FULD, in his opinion below described as "unprecise" and "vague", the meaning of which must be largely "left to the gradual development of general notions about what is decent"* (1 N. Y. 2d pp. 181-182). That is hardly an adequate guide for the judge called upon to apply the standard of "obscene" in a particular case. There is some dicta of this Court to the effect that "obscene" publications may be punished, *Near* v. *Minnesota*, 283 U. S. 697, 716; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-2. And in *Doubleday & Co., Inc.* v. *New York*, 335 U. S. 848, a judgment convicting defendant of publishing an "obscene, lascivious, filthy and disgusting book" was affirmed by an evenly divided court. But more recent authority indicates that a contrary determination may be reached by the present Court. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *Holmby Productions, Inc.* v. *Vaughn*, 350 U. S. 870.

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* Quoting Judge LEARNED HAND, *United States* v. *Kennerley*, 209 F. 119, 121.

POINT III.

The statute imposes an unconstitutional, prior restraint on freedom of communication.

The First Amendment guaranty of freedom of the press was adopted primarily to prevent censorship prior to publication; and any interference with communication in advance of publication is especially condemned. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503-504; *Lovell* v. *Griffin*, 303 U. S. 444, 451-452; *Near* v. *Minnesota*, 283 U. S. 697, 713-716; *Patterson* v. *Colorado*, 205 U. S. 454, 462.

The question of whether the First Amendment grants total immunity from previous restraints upon publication has not been determined, but it is clear that such prior restraint, if permissible at all, can be permitted only under extreme and exceptional circumstances. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. at p. 504. It cannot be claimed that the situation with which Section 22a purported to deal is so extreme or exceptional as to warrant the imposition of interference in advance of publication.

Judge FULD, in his opinion below, indicated that Section 22-a does not impose a prior restraint upon publication since it does not require the submission of books and writing for an imprimatur before circulation. 1 N. Y. 2d at p. 185. While the statute does not impose so pervasive a restraint as a licensing law, it does permit interference with books and magazines in advance of their publication, and for that reason is particularly offensive to the Constitution.

The right to publish obviously includes the right to circulate and distribute. *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Martin* v. *Struthers*, 319 U. S. 141; *Grosjean* v. *American Press Co.*, 297 U. S. 233. Under Section 22-a of the New York Criminal Code, a publication may be sup-

pressed before it is delivered to or seen by any potential reader, and, indeed, before it is forwarded to any dealer who may make it available to the public.

The purpose of the prohibition of prior restraint is to prevent the government from stifling expression before it may be communicated. Whether the expression is repressed before publication by means of a licensing law or by means of injunction or any other device is wholly immaterial.

Even if obscene books do constitute an evil sufficiently grave to justify government intervention, such interference with the freedom of the press can constitutionally be exercised only by subsequent punishment and not by a statute, such as the one under consideration, authorizing suppression in advance of publication. As Mr. Chief Justice HUGHES wrote in *Near* v. *Minnesota*, 283 U. S. 697, 720:

> "The fact that the liberty of the press may be abused . . . does not make any less necessary the immunity of the press from previous restraint . . . Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

Conclusion.

The judgment of the Court below should be reversed and Section 22-a of the New York Code of Criminal Procedure should be declared unconstitutional as a violation of the freedom of the press guaranteed by the First and Fourteenth Amendments.

Respectfully submitted,

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APPENDIX.

Stipulation.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 107.

KINGSLEY BOOKS, INC., *et al.*,

Appellant,

against

PETER CAMPBELL BROWN, etc.,

Appellee.

The undersigned, as counsel for the parties to the above-entitled appeal, consent to the filing of a brief by the New York Civil Liberties Union as *amicus curiae* herein.

Dated: New York, N. Y., March 13, 1957.

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Counsel for Appellant.

PETER CAMPBELL BROWN,
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